

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	File No. EB-10-SE-003
)	NAL/Acct. No. 201132100014
BASF Corporation)	FRN 0019696137
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 16, 2010**Released: December 17, 2010**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find BASF Corporation (“BASF”), former licensee of Private Land Mobile Radio Service (“PLMRS”) station WPNZ510, Pasedena, Texas, apparently liable for a forfeiture in the amount of twenty-five thousand dollars (\$25,000) for apparent willful and repeated violation of section 301 of the Communications Act of 1934, as amended (“Act”)¹ and section 1.903(a) of the Commission’s rules (“Rules”)² and for apparent willful violation of section 1.949(a) of the Rules.³ The noted apparent violations involve BASF’s failure to timely file a renewal application for its PLMRS station and its operation of the station for five years without Commission authority.

II. BACKGROUND

2. On August 12, 1999, BASF was granted a five-year license to operate station WPNZ510 through August 12, 2004. On May 17, 2004, the Commission sent BASF a renewal reminder notice, indicating that a failure to file a timely renewal application would lead to automatic expiration of the license. BASF did not submit a renewal application for station WPNZ510 prior to the license expiration date. In the absence of such filing, BASF’s license for station WPNZ510 automatically canceled on the expiration date.⁴ On December 18, 2009, BASF filed with the Wireless Telecommunications Bureau (“WTB”) a request for Special Temporary Authority (“STA”), stating that it had recently discovered that its license for station WPNZ510 had expired five years earlier and that the STA was necessary for continued operation of its radio communications at its Clear Lake, Texas chemical manufacturing site

¹ 47 U.S.C. § 301.

² 47 C.F.R. § 1.903(a).

³ 47 C.F.R. § 1.949(a).

⁴ See 47 C.F.R. § 1.955(a)(1) (stating that “[a]uthorizations automatically terminate, without specific Commission action, on the expiration date specified therein, unless a timely application for renewal is filed.”).

pending the closing date of a transaction involving the sale of the Clear Lake site on or about December 31, 2009.⁵ On December 22, 2009, WTB granted the STA under call sign WQLE249.⁶

3. Because it appeared that BASF may have operated station WPNZ510 after the expiration of its license, WTB referred the matter to the Enforcement Bureau for investigation and possible enforcement action. On March 1, 2010, the Spectrum Enforcement Division of the Enforcement Bureau issued a letter of inquiry (“LOI”) to BASF.⁷

4. In its March 31, 2010 response to the LOI,⁸ BASF claimed that it discovered the expiration of its license to operate station WPNZ510 on or about December 9, 2009, in the course of performing due diligence in connection with the sale of its Clear Lake, Texas chemical manufacturing site.⁹ BASF acknowledged that it used the frequencies associated with station WPNZ510, without obtaining the required Commission authority, in connection with day-to-day operations at its Clear Lake manufacturing facility between August 12, 2004, the date the license for station WPNZ510 expired, and December 31, 2009, when BASF sold the Clear Lake facility.¹⁰ According to BASF, the expiration of the license for station WPNZ510 appears to have resulted from an administrative oversight.¹¹ BASF also asserted that it promptly and voluntarily disclosed its oversight to the Commission and sought an STA upon discovering the expired license.¹² Further, BASF noted that it has begun to design and implement revised procedures to ensure its ongoing compliance with the Commission’s licensing requirements.¹³

III. DISCUSSION

5. Section 301 of the Act and section 1.903(a) of the Rules prohibit the use or operation of any apparatus for the transmission of energy or communications or signals by radio except under, and in accordance with, a Commission-granted authorization.¹⁴ Additionally, section 1.949(a) of the Rules requires that licensees file renewal applications for wireless radio stations, “no later than the expiration date of the authorization for which renewal is sought, and no sooner than 90 days prior to expiration.”¹⁵ Absent a timely filed renewal application, a wireless radio station license automatically terminates.¹⁶

⁵ See File No. 0004070696.

⁶ WTB granted the STA on December 22, 2009, without prejudice to any enforcement action related to unauthorized operation of station WPNZ510.

⁷ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Julie Y. Wong, BASF Corporation (March 1, 2010).

⁸ See Letter from Brian Murray, Esq., Latham & Watkins LLP, to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (March 31, 2010) (“LOI Response”).

⁹ See LOI Response at 1, 3.

¹⁰ See *id.* at 3.

¹¹ See *id.*

¹² See *id.* at 1.

¹³ See *id.* at 2. See also Letter from Brian Murray, Esq., Latham & Watkins LLP, to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (May 5, 2010) (supplementing the LOI Response regarding BASF’s license renewal procedures).

¹⁴ 47 U.S.C. § 301; 47 C.F.R. § 1.903(a).

¹⁵ 47 C.F.R. § 1.949(a).

¹⁶ 47 C.F.R. § 1.955(a)(1).

6. As a Commission licensee, BASF was required to maintain its authorization in order to operate station WPNZ510. BASF admitted that it operated its PLMRS station without Commission authority in connection with day-to-day operations at its Clear Lake manufacturing site for more than five years, from August 12, 2004, the license expiration date, until December 22, 2009, when WTB granted BASF's STA request.¹⁷ By operating station WPNZ510 after the license expiration date, BASF apparently violated section 301 of the Act and section 1.903(a) of the Rules. BASF also apparently violated section 1.949(a) of the Rules by failing to timely file a renewal application for station WPNZ510.

7. Section 503(b) of the Act¹⁸ and section 1.80(a) of the Rules¹⁹ provide that any person who willfully or repeatedly fails to comply with the provisions of the Act or the Rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Act, the term "willful" means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission's Rules, and "repeated" means more than once.²⁰ Based on the record before us, it appears that BASF's violation of section 301 of the Act and section 1.903(a) of the Rules is willful and repeated, and its violation of section 1.949(a) of the Rules is willful.

8. In determining the appropriate forfeiture amount, section 503(b)(2)(E) of the Act directs us to consider factors, such as "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²¹

9. Section 1.80(b) of the Rules sets a base forfeiture amount of \$10,000 for operation of a station without Commission authority and a base forfeiture amount of \$3,000 for failure to file required forms or information.²² The Commission has held that a licensee's continued operation without authorization and its failure to timely file a renewal application constitute separate violations of the Act and the Rules and warrant the assessment of separate forfeitures.²³ Given the circumstances of this case, we start with the base forfeiture amount of \$10,000 for BASF's continued operation of station WPNZ510 after the expiration of its license on August 12, 2004, and the \$3,000 base forfeiture amount for BASF's failure to timely file a renewal application – for a total base forfeiture of \$13,000.²⁴

¹⁷ See LOI Response at 3.

¹⁸ 47 U.S.C. § 503(b).

¹⁹ 47 C.F.R. § 1.80(a).

²⁰ See 47 U.S.C. § 312(f)(1) & (2). See also *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (the definitions of willful and repeated contained in the Act apply to violations for which forfeitures are assessed under section 503(b) of the Act).

²¹ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures; *Forfeiture Policy Statement*, Report and Order, 12 FCC Rcd 17087, 17110 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

²² 47 C.F.R. § 1.80(b). See also *Forfeiture Policy Statement*, 12 FCC Rcd at 17099 (noting that "[a]lthough we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act.").

²³ See *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 7433, 7438 (2004).

²⁴ While section 503(b)(6) of the Act bars the Commission from proposing a forfeiture for violations that occurred more than a year prior to the issuance of an NAL, we may consider the fact that BASF's misconduct occurred over an extended period (between 2004 and 2009) to place "the violations in context, thus establishing the licensee's degree of culpability and the continuing nature of the violations." *Roadrunner Transportation Inc.*, Forfeiture (continued....)

10. This base forfeiture amount, however, is subject to adjustment, either upward or downward. Here, we find no basis for a downward adjustment. Once BASF's license expired, it lacked the required authority to operate station WPNZ510 but continued to do so. The Commission has emphasized that "[a]ll licensees are responsible for knowing the terms of their licenses and for filing a timely renewal application if they seek to operate beyond that term."²⁵ BASF's assertions that it has designed revised compliance procedures,²⁶ while laudable, do not negate its liability for the instant violations, nor do these post-investigation remedial efforts warrant reduction of the forfeiture.²⁷ Similarly, in the current context, we will not reduce the base forfeiture amount on other grounds, including BASF's disclosure of its violation just prior to seeking a transfer of the license and long after the license's expiration, or the nature of the station as part of the Private Land Mobile Radio Service. Indeed, we are mindful of the fact that the reduced forfeiture amounts applied in past cases do not appear to be creating sufficient incentives for all PLMRS licensees to monitor their license expiration dates and timely seek renewal.²⁸

11. Given the totality of the circumstances and consistent with the *Forfeiture Policy Statement*, we conclude that an upward adjustment of the \$13,000 base forfeiture is warranted. In this regard, we take into account the fact that BASF's unlawful operation continued for more than five years.²⁹ We also recognize that BASF is a multi-billion dollar, global enterprise,³⁰ and to ensure that forfeiture liability is a deterrent and not simply a cost of doing business, the Commission has determined that large or highly-profitable companies such as BASF should expect the assessment of higher forfeitures for

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Order, 15 FCC Rcd 9669, 9671-72 (2000). The forfeiture amount we propose herein relates only to BASF's apparent violations that have occurred within the past year.

²⁵ See *Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, 13 FCC Rcd 21027, 21071 ¶ 96 (1998) (noting that the renewal reminder letter is a "convenience to licensees [and] does not in any way absolve licensees from timely filing their renewal applications").

²⁶ See *supra* note 13 and accompanying text.

²⁷ See *Seawest Yacht Brokers*, Forfeiture Order, 9 FCC Rcd 6099, 6099 ¶ 7 (1994) (corrective action taken to comply with the Rules is expected, and does not mitigate any prior forfeitures or violations); see also, *United States Cellular Corp.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 16424, 16429 ¶ 14 (2007) (remedial efforts taken after the deadline did not mitigate violation of the Commission's E911 rules and relevant orders); *AT&T Wireless Services, Inc.*, Forfeiture Order, 17 FCC Rcd 21866, 21875-6 ¶¶ 26-28 (2002) (remedial action to correct tower painting violation was not a mitigating factor warranting reduction of forfeiture).

²⁸ See e.g., *Mathews Readymix LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 12828, 12831 (Enf. Bur., Spectrum Enf. Div. 2007) (proposing a \$6,200 forfeiture for unauthorized operation of a PLMRS station and for failure to file a timely license renewal application). We also note that the instant case is distinguishable from *Discussion Radio* which turned on its particular facts. See *supra* note 23. In *Discussion Radio*, the Commission imposed a forfeiture against a broadcast licensee for 14 months of unauthorized operation, observing that the licensee's conduct in that case was not comparable to "pirate" radio operations. See *id* at 7438. In reducing the forfeiture amount in *Discussion Radio* from \$10,000 to \$5,000, the Commission particularly noted that the broadcast license renewal packet that would have facilitated timely renewal filing was misdirected to an incorrect address. *Id.* The Commission further limited its decision, stating that it would be "disinclined to propose reductions in future cases based on alleged errors in mailing license renewal materials." *Id.* at n.20.

²⁹ See 47 C.F.R. § 1.80(b)(4), Note to Paragraph (b)(4): *Section II. Adjustment Criteria for Section 503 Forfeitures* (establishing "repeated or continuous violation" as an upward adjustment factor).

³⁰ BASF is the world's largest chemical company, has more than 150 major manufacturing facilities, and does business worldwide. Currently, BASF is also ranked 81 on the Fortune 500, with reported revenues of more than \$70 billion. See http://money.cnn.com/magazines/fortune/global500/2010/full_list/ (last visited Dec. 17, 2010).

violations.³¹ In the final analysis and based on all the factors and evidence, including the extended period of unauthorized operation and BASF's size and ability to pay a forfeiture, we conclude that a forfeiture of twenty-five thousand dollars (\$25,000) is appropriate.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act³² and sections 0.111, 0.311 and 1.80 of the Rules,³³ BASF Corporation **IS** hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for the willful and repeated violation of section 301 of the Act and section 1.903(a) of the Rules and the willful violation of section 1.949(a) of the Rules.

13. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Rules,³⁴ within thirty days of the release date of this *Notice of Apparent Liability for Forfeiture*, BASF Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture consistent with paragraph 15 below.

14. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. BASF Corporation must also send electronic notification to Ricardo.Durham@fcc.gov and to Linda.Nagel@fcc.gov on the date said payment is made.

15. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.80(f)(3) and 1.16 of the Rules. The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Account Number referenced in the caption. The statement must also be emailed to Ricardo.Durham@fcc.gov and to Linda.Nagel@fcc.gov.

³¹ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099-100 (cautioning all entities and individuals that, independent from the uniform base forfeiture amounts, the Commission will take into account the subject violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business, and noting that such large or highly profitable entities should expect that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount).

³² 47 U.S.C. § 503(b).

³³ 47 C.F.R. §§ 0.111, 0.311, 1.80.

³⁴ 47 C.F.R. § 1.80.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by first class mail and certified mail, return receipt requested to Keith H. Ansbacher, Vice President and Associate General Counsel, BASF Corporation, 100 Campus Drive, Florham Park, NJ 07932, and to counsel for BASF Corporation, Brian Murray, Esq., Latham & Watkins LLP, 555 Eleventh St., N.W., Suite 1000, Washington, DC 20004-1304.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau